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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE CORPORATION; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive, Defendants.	Case No. 2:07-CV-00682- PMP-LRL **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT MENU FOODS, INC.'S MOTION TO DISMISS COMPLAINT** DATE: TIME: JUDGE: Hon. Philip M. Pro

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I. INTRODUCTION

Plaintiffs allege that Defendants have cheated United States consumers and Defendants' competitors alike by lying about the origin of their "Ol' Roy" brand pet food products as "MADE IN THE U.S.A." The laws of the United States, Nevada, and the other states uniformly do not allow businesses to cheat to compete for market share by lying about the origin of the sellers' product. Mislabeling as to product origin violates N.R.S. §598.0915 and the consumer protection statutes of every other state.[1]

The motion for dismiss by Defendant Menu Foods, Inc. ("Menu Foods") is largely duplicative of the motion to dismiss previously filed by Defendant Del Monte. Defendant Menu Foods, Inc.'s motion first attacks the sufficiency of the claim for violation of Nevada's consumer fraud laws (N.R.S. §598.0915). That argument is entitled to short shrift because this action is based upon the Defendants' scheme to distribute products as "Made in the USA", when in fact this designation was false. Defendants have admitted that components of the products were made in China. This conduct is a per se violation of N.R.S § 598.0915.

Menu Foods objects to Plaintiff's reference to federal law regarding the issue of what is "Made in the USA." Such an argument is specious as the Complaint referred to federal law, not to create a private right of action, but rather to determine whether a product can be truthfully labelled"Made in the USA." Nevada law then confers a private right of action for products which are improperly designated. The reference to federal law in the Complaint, and in particular, the rules established by the Federal Trade Commission and by 62 Fed. Reg. 63756, was to allege the applicable standard for when a product can be called "Made in USA." **The product must be "all or virtually all" made in the U.S. Under this standard, "All or virtually all" means that "all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain**

[1] Defendants are cheating consumers who think they are buying a product made in America and also cheating their competitors who sell pet food that actually is made in America. This deceptive and unfair conduct is like the conduct condemned by the California Supreme Court in *Stop Youth Addiction v. Lucky Stores Inc.*, 17 Cal.4th 553, 579, 950 P.2d 1086, 1103 (1998) ("Merchants who violate the law by selling tobacco products to minors obtain a competitive advantage over their law-abiding counterparts who do not share in the profits from such illegal sales.")

no — or negligible — foreign content."[2] Here, Defendant callously admits that the labels for the products lied because the key manufactured component of Wheat Gluten was wholly Made in China, but argues that the designation was not deceptive because the product was bagged in the United States. Bagging a product in the United States, when the product is composed of foreign manufactured components or materials, does not equal "Made in the USA". 62 Fed. Reg. at 63769-70. In light of this admission that a significant component was manufactured in China, Defendant's unsupported argument that the "Made in USA" designation on their product was legal and not deceptive is incorrect. 62 Fed. Reg. at 63768 and 63764. Nevertheless, this is a factual question for trial, not an question that can be resolved through a Rule 12 motion.

Further, this conduct violates federal standards and the laws of the 49 other states. As a result, a nationwide class is appropriate. To the extent that this Court later determines, after a conflict of laws analysis, that Nevada law cannot be applied to the claims of certain members of the Class, the litigation would still be manageable because the conduct violates the laws of the states where Defendants are headquartered and the laws of all other states. In any event, this class manageability issue should not be decided now in a Rule 12 context.

Menu Foods also argues that the unjust enrichment claim is legally insufficient because factually no benefit was retained. This argument is contrary to the allegations of the Complaint (¶46 and ¶47), and is therefore improper on a motion to dismiss. Moreover, Menu Food's argument relies exclusively on a recall notice expressly limited to specified contaminated lots, and did not provide for any remedy as to the Defendants' falsely labeled products that were not recalled. Defendants have clearly retained benefits from their unlawful conduct as to their mislabeled products that were not recalled.

Finally, the motion to dismiss by Menu Foods argues that Plaintiff has not sufficiently pled the alleged fraud as to the geographic origin of the "Ol' Roy" brand pet food products. Again, this argument is belied by the allegations of the Complaint. At paragraph 39 of the Complaint, Plaintiff specifically pleads the how, when and where of the alleged fraud perpetrated on the Plaintiff and other consumers. The details of how each Defendant participated in the fraudulent scheme is a matter within the exclusive knowledge of the Defendants and is a matter for discovery. These allegations of fraud in this case clearly suffice under the controlling Nevada Supreme Court decision in *Rocker v. KPMG* 148 P. 3d 703, 704, 122 Nev. Adv. Rep. 101 (2006).

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[2] Emphasis added and internal citations omitted unless otherwise indicated

At bottom, the motion by Menu Foods simply improperly disputes the factual allegations of the Complaint, which is not the role of a Rule 12 motion. Before the merits of factual disputes in this case can be decided, Plaintiff must be permitted discovery and an opportunity to present evidence to establish the allegations of the complaint. For the reasons set forth hereinbelow, and as argued in response to the Del Monte motion to dismiss, Plaintiff respectfully requests that this Court deny Defendant Menu Food's motion to dismiss.

II. STATEMENT OF FACTS

The instant Class Action Complaint involves a scheme among the Defendants through which "Ol' Roy" brand pet food products were intentionally mislabeled and sold to consumers as "Made in USA," when in fact components of the "Ol' Roy" brand pet food products were made and/or manufactured in China. Specifically, the wheat was processed in China into wheat gluten, and as a result, Defendants were not entitled to label these products as "Made in the U.S.A." as Defendants well know. This action is brought on behalf of all consumers throughout the United States who purchased "Ol' Roy" brand pet food products which falsely represent on the product label to have been "Made in USA" during the applicable Class Period. (Complaint at ¶ 1).

Central to the Defendants' marketing of certain of their "Ol' Roy" products is the representation and designation that such products were and are "Made in USA." Defendants package these products with the designation on the label or packaging, in capital and bold lettering, that the products were "MADE IN USA." (Complaint at ¶ 2).

Studies show that the "MADE IN USA" is a substantial factor in consumer purchasing decisions. More importantly here, in the context of food products, the designation that the products were "Made in USA" becomes a central and primary consumer concern because of fears about contaminants and the differences in health and safety procedures in foreign countries. (Complaint at

¶ 2).

All of the pet food products under the brand name "Ol' Roy" sold to consumers in Nevada and nationwide were mislabeled in the same way. On each package of "Ol' Roy" pet food, the label uniformly represents that the product was "MADE IN USA" in capital letters. (Complaint at ¶ 4). Contrary to this representation, "Ol' Roy" brand pet foods were not "Made in USA" as falsely designated, but instead, were manufactured either in whole or in part, in China. On or after March 16, 2007, as a result of the investigation into these products, Defendants disclosed for the first time that the "Ol' Roy" brad pet food products contained ingredients manufactured in China. (Complaint at ¶ 6).

Consumers and users of these products are particularly vulnerable to these deceptive and fraudulent practices. Defendants were in the exclusive possession of information regarding the country of origin for "Ol' Roy" brand pet food products. The "Made in USA" labeling as to designation of origin is a material factor in many people's purchasing decisions, as they believe they are buying truly American products and supporting American companies and American jobs. Consumers generally believe that "Made in USA" products are higher quality products than those of other countries which is especially true with regard to food products. Unaware of the falsity of the Defendants' country-of-origin claims, Plaintiff and the other members of the Class all purchased "Ol' Roy" brand pet food products that had been fraudulently marketed and mislabeled by Defendants. State and federal laws uniformly outlaw this mislabeling to protect consumers and competitors alike from this type of false advertising and predatory conduct. Defendants' deception of consumers is ongoing and will victimize consumers every day until the practice is deterred by judicial intervention. (Complaint at ¶ 11).

The country-of-origin designation is especially important and material in the context of food products because of oversight one expects by the Food and Drug Administration and local health agencies over food products made in the United States. For example, food products made in foreign countries can be grown or made using banned pesticides and/or chemicals, which one would not expect to find in "Made in USA" labeled food products. Consumers who purchase food products labeled "Made in USA" reasonably believe that they are purchasing products which have been grown and made in accordance with state and federal regulations. These same regulations are not present in foreign countries where unsafe and deleterious chemicals may be used without regulatory oversight. (Complaint at ¶ 12). The fact that Defendant's product, parts of which were manufactured in China, was later bagged in the United States does not entitle the Defendant to falsely represent the designation of origin of all the products components, without limitation, as "Made in USA." 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997). Defendant's motion cites to no authority which would permit this designation, and indeed, the uniform federal standard for the "Made in USA" designation is to the contrary.[3] (Complaint at ¶8). This is especially true in the context of food products where the failure of Chinese manufacturing and safety are manifest.

The Plaintiff Margaret Picus is a resident of Nevada, who purchased her "Ol' Roy" brand pet food products on multiple occasions at a Wal-Mart retail store located in Henderson, Nevada during the Class Period. The Plaintiff purchased "Ol' Roy" brand pet food products as a consumer for the household purpose of feeding the product to her pet during the Class Period. (Complaint at ¶ 13). Defendant concealed the true facts regarding the geographic origin of the "Ol Roy" brand pet food products, and if Plaintiff and the other members of the Class had known of the facts which Defendants and each of them failed to disclose, they would never have purchased the Ol' Roy brand pet food products as they did. (Complaint at ¶¶ 39-41). When the Plaintiff learned of the Defendants' fraudulent conduct she filed the instant lawsuit on behalf of herself and all similarly situated consumers nationwide who purchased fraudulently labeled Ol' Roy pet food products at Wal-Marts prior to March 16, 2007. (Complaint at ¶ 21). The Complaint alleges three causes of action based upon the fraudulent designation of Ol' Roy products as "Made in the USA": (1) violations of Nevada's consumer fraud laws, particularly N.R.S. Sections 41.600 and 598.0915, (2) unjust enrichment, and (3) common law fraud and concealment.

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[3] Under federal requirements, for a product to be called "Made in USA," the product must be "all or virtually all" made in the U.S." Under this standard, "All or virtually all" means that "all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content." *See* Federal Trade Commission Statement "Complying with the Made In the USA Standard." Because Defendant's product does not meet this standard, Defendant attacks this federal standard without authority.

III. LEGAL BACKGROUND FOR PLAINTIFF'S CLAIMS

Until the 1930s, the rule of *caveat emptor* prevailed in the marketplace. Deceived consumers had no claim at common law. Consumers were left to the devices of unscrupulous sellers under the doctrine of *caveat emptor*.

Then in 1938, Congress amended the Federal Trade Commission Act ("FTC Act"), and in particular, Section 5. "Of particular importance was a 1938 amendment to the act, which expanded the Federal Trade Commission's (FTC) preexisting jurisdiction over "unfair methods of competition'" to include "unfair or deceptive acts or practices." (52 Stat. 111 (1938), amending 15 U.S.C. § 5.)" *Bank of the West v. Superior Court*, 833 P.2d 545, 551; 2 Cal. 4th 1254, 1264 (1992). "**This amendment, which became a model for state regulatory statutes, gave the FTC concurrent jurisdiction over unfair business practices that harmed the public in order to bring confidence and honesty back to the marketplace.**" *Id.*

Despite the broad scope and reach of the FTC Act, Section 5 was not privately actionable. Therefore, in order to give consumers a private right of action, Congress and the FTC encouraged the states to enact their own similar statutes to protect consumers. Every state and the District of Columbia have enacted some law or combination of laws prohibiting acts of unfair competition. **The primary purpose of these statutes was to "extend to the entire consuming public the protection once afforded only to business competitors."** *Barquis v. Merchs. Collection Assn.*, 496 P.2d 817, 828; 7 Cal. 3d 94, 109 (1972). These state consumer protection laws and the FTC Act have **concurrent jurisdiction** over unfair and deceptive business practices. *Consumer Justice Center v. Olympian Labs*, 99 Cal. App. 4th 1056, 1058-61 (2002); *Colligan v. Activities Club of New York*, 442 F.2d 686, 693 (2nd Cir. 1971) ("adequate private remedies for consumer protection, which to date have been left almost exclusively to the states, are readily at hand.") . **Therefore, the fact that a practice violates federal law does not mean that the same practice cannot be challenged under state law. Instead, state courts look to the "parallel" authority and decisions of the FTC to determine whether a practice is deceptive or unfair under the state laws.** *Cel-Tech Communications v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543; 20 Cal. 4th 163, 185 (1999).

The concurrent jurisdiction of state and federal law over deceptive trade practices is

further evidenced by Nev. Rev. Stat. Ann. § 598.0923 which defines "deceptive trade practices" as including conduct that "violates a state or federal statute or regulation relating to the sale or lease of goods or services." See *George v. Morton*, 2007 U.S. Dist. LEXIS 15980 at * 32 (D. Nev. March 1, 2007) (denying motion to dismiss claim under Nevada Unfair and Deceptive Trade Practices Act alleging violation of state and federal regulations in condominium sales).

There are four basic types of state consumer protection statutes. Some states, like California, Florida and Hawaii, enacted "Little FTC Acts" which were patterned after Section 5 of the FTC Act by generally prohibiting deceptive and unfair business practices. Other states, like Georgia, Tennessee and Pennsylvania, enacted statutes which prohibited specific listed practices and generally prohibited any act that is deceptive or unfair to the consumer. Ohio, Kansas and Utah patterned their consumer protection laws after the Uniform Consumer Sales Practices Act. Finally, Nevada, and twelve other states, including Delaware, Illinois and Oregon, enacted a version of the Uniform Deceptive Trade Practices Act which provides for consumer protection by prohibiting specific "deceptive trade practices." **Relevant to this case, one of these expressly prohibited practices is the use of "deceptive representations or designations of geographic origin.**" Importantly, mislabeling is actionable under all four types of consumer protection laws.

This background is important to the consideration of this case because the history of the enactments illustrates that federal standards are useful in determining whether the state statutes are violated and because our system relies on private state enforcement alongside federal agency enforcement. Thus, not only is the conduct in this case properly challenged under state law, state law enforcement is the only source of authority for consumers to seek redress.[4]

IV. ARGUMENT

Menu Foods argues that the complaint should be dismissed because (i) Plaintiff has no private right of action under the Federal Trade Commission Act, (ii) Count I of the Complaint fails to state

[4] In *Mangini v. RJ Reynolds Tobacco*, 875 P.2d 73, 78; 7 Cal. 4 th 1057, 1065 (1994) the FTC is quoted by the California Supreme Court to the effect that FTC inaction should not be construed as a determination that a violation has not occurred.

a claim for relief under the Nevada Deceptive Trade Practices Act, (iii) Count I of the Complaint fails to state a claim for relief under the law of any other state other than Nevada, (iv) Count II of the Complaint must be dismissed for failure to plead fraud with particularity against Menu Foods, and (v) Count III of the Complaint fails to state a cause of action for unjust enrichment.

A. The Applicable Pleading Standard

In considering a motion to dismiss, the court accepts the plaintiff's allegations as true and construes them in the light most favorable to the plaintiff. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003); *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1046 (9th Cir. 2006); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). The sufficiency of the complaint must be determined considering the allegations in their entirety and viewing all facts in the complaint as a whole. *Id.* There is a strong presumption against dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). As such, a motion to dismiss for failure to state a claim should be denied unless it "appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle him or her to relief." *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir. 2004); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1156 (9th Cir. 2000). **As a result, under settled Ninth Circuit precedent, a Rule 12(b)(6) dismissal is only proper in extraordinary cases. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).**

Further, under Federal Rule of Civil Procedure 8(e), a party may plead claims in the alternative, and therefore, a party may alternatively state claims both for legal and equitable relief. As set forth in Federal Rule of Civil Procedure 8(e)(2):

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. **A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.**

Thus, although a plaintiff may not recover on both theories, "a plaintiff may claim these remedies as alternatives" *E.H. Boly & Son, Inc. V. Schneider*, 525 F.2d 20, 23 (1975); see also *Hubbard Business Plaza v. Lincoln Liberty Life Ins. Co.*, 596 F.Supp. 344, 347 (D. Nev. 1984) ("It is legally proper for a pleading to set forth inconsistent theories as bases for the relief sought.")

Finally, as a practical matter, leave to amend is almost always granted by the Court. Fed. R. Civ. P. § 15(a) expressly states that leave to amend "shall be freely given when justice so requires." As a result, where the complaint might state a claim, leave to amend must be granted. *Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Silva v. Bieluch*, 351 F.3d 1045, 1048 (11th Cir. 2003).

B. Plaintiff's Claims Are Legally Sufficient

1. Plaintiff's Claim For Violations of Nevada Consumer Fraud Laws Is Legally Sufficient

The Complaint alleges a scheme by Defendants whereby certain products were fraudulently and unlawfully mislabeled as "Made in the USA," when in fact Defendants knew that certain important components of the product were imported from and manufactured in China, which precludes the use of the "Made in USA" designation. See e.g. *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006). Plaintiff alleges that such a scheme violates the "Nevada consumer fraud laws, particularly NRS Sections 41.600 and 598.0915." (Complaint at ¶27). These statutes provide victimized consumers, like the Plaintiff, with a private right of action.[5]

Further, there can be no dispute that the conduct alleged in the Complaint violates N.R.S. Section 598.0915 which provides, in relevant part, as follows:

> **A person engages in a 'deceptive trade practice" if, in the course of his business or occupation, he:**
>
> **4. Uses deceptive representations or designations of geographic origin in connection with goods or services for sale or lease.**

N.R.S. § 598.0915.

In this case, the Defendants' false representation and designation of the products as "Made in the USA", when in fact, the contents of the product were not "all or virtually all" "Made in the USA"

[5] Nevada Revised Statute Chapter 598 "generally provides for a public cause of action for deceptive trade practices." *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. 948, 102 P.3d 578, 583 n.7 (Nev. 2004). Nevada Revised Statute § 41.600 also provides that a victim of "consumer fraud" may assert a private cause of action. *Id.* Consumer fraud includes "[a] deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive." *Id.* (quoting Nev. Rev. Stat. 41.600(2)(d)).

plainly violates the express prohibition on such conduct. 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997). As held by one Court in California ruling on this same issue:

> **A reasonable consumer of Leatherman's products with the "Made in U.S.A." representation would not expect such foreign manufacturing. (See Fed. Trade Com., Enforcement Policy Statement on United States Origin Claims (Enforcement Policy) 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997)** ["consumers are likely to understand an unqualified U.S. origin claim to mean that the advertised product is '**all or virtually all' made in the United States"**].) No reasonable trier of fact could conclude otherwise. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856 [107 Cal. Rptr. 2d 841, 24 P.3d 493].) **Thus, the "Made in U.S.A." representations were deceptive as a matter of law.**

Colgan v. Letherman Tool Group, 135 Cal. App. 4th 663, 682-3 (2006).[6]

Menu Foods, however, objects to Plaintiff's reference to federal law regarding the issue of what is "Made in the USA." Such an argument is specious as the Complaint referred to federal law, not to create a right of action, but rather to determine whether a product can be truthfully labelled"Made in the USA." Nevada law then confers a private right of action for products which are improperly designated.[7]

The reference to federal law in the Complaint, and in particular, the rules established by the Federal Trade Commission and in 62 Fed. Reg. 63756, was to allege the applicable standard for when a product can be called "Made in USA." **The product must be "all or virtually all" made in the U.S. Under this standard, "All or virtually all" means that "all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content."** Here, Defendant callously admits that the label was a lie because the key manufactured component of Wheat Gluten was wholly Made in China, but argues that the designation was not deceptive because the product was bagged in the United States. Bagging a product in the United States, when the product is composed of foreign manufactured components or materials, does not equal "Made in the USA". 62 Fed. Reg. at 63769-70. In light of this admission that a significant component was manufactured in China, Defendant's unsupported argument that the "Made in USA" designation on their product was legal and not deceptive is incorrect. 62 Fed. Reg. at 63768 and 63764. Nevertheless, this is a factual question for trial, not a Rule 12 motion.

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[6] The Court in *Colgan* expressly referred to the FTC standard to determine whether the designation of "Made in USA" was deceptive.

[7] Nevada's attorney general follows this federal standard. 62 FR at 63758, n8.

Thus, Plaintiff's citation to the federal standard to determine whether Defendants' conduct is a deceptive trade practice with respect to the designation of a geographic origin was entirely proper. **The citation to federal authority in the Complaint was not intended, nor did it, invoke federal law as a private right of action. Plaintiff's private right of action is based upon N.R.S. Sections 41.600 and 598.0915. Menu Food's argument on this point is misplaced as the federal standard will be the test to determine when the products could lawfully be designated as "Made in the USA" under N.R.S. Section 598.0915.**

2. Plaintiff's Claim for Unjust Enrichment Is Also Legally Sufficient

Menu Foods incorrectly asserts that Plaintiff's claim for unjust enrichment fails because Defendant did not retain a benefit unjustly conferred..

In Nevada, unjust enrichment is "'the unjust retention of a benefit to the loss of another. . . .'" *Coury v. Robison,* 115 Nev. 84, 976 P.2d 518, 521 (Nev. 1999) (quoting *Nev. Indus. Dev. v. Benedetti,* 103 Nev. 360, 741 P.2d 802, 804 n.2 (Nev. 1987)). A benefit "denotes any form of advantage." Restatement of Restitution § 1 cmt. b (1937); Restatement (Second) of Torts § 886B cmt. c (1979). In this case, the Complaint sufficiently alleges the elements of a claim for unjust enrichment. *Stewart Title of Nevada v. Haenisch*, 2006 U.S. Dist. Lexis 90513, at *19 (D. Nev. 2006). Unjust enrichment applies here because "money paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it." *Nevada Indus. Dev. v. Benedetti*, 103 Nev. 360, 363, fn.2 (1987).

Menu Foods claims that the voluntary recall nullifies any unjust enrichment claim. Specifically, the recall notice issued by Defendants with regard to certain contaminated lots offered a refund of "all voluntarily recalled products." Based on this evidence, Menu Foods argues that the Court should factually find that Menu Foods did not retain any "benefit." This argument is fatally flawed for multiple reasons. The recall of specific product codes of products due to contamination is not coextensive with the claim now asserted as to all "Ol' Roy" pet food products sold before March 16, 2007. **The recall notice only offered refunds for certain contaminated lots and is in no way equivalent to the recovery sought in this case for all mislabeled products.** The Class in this case is much broader and substantively different from those affected by the recall notice. Moreover, the claim alleged here is for all mislabeled "Ol' Roy" products sold during the Class period, not just for a specific lot that was contaminated. Plaintiff and the Class Members bought far more pet food that had been fraudulently mislabeled by Defendants than the narrow subset of the lot of contaminated pet food subject to the recall.

This argument also fails as a procedurally flawed dispute as to the merits of Plaintiff's factual allegations (Complaint at ¶46 and ¶ 47), which cannot be resolved through a motion to dismiss. This argument attacks the factual allegations of the complaint which must for purposes of the Motion to Dismiss be viewed as true.

As the Complaint plainly alleges at paragraphs 46 and 47:

> Defendants have benefitted and been enriched by the above-alleged conduct. Defendants sold the Ol' Roy brand pet food products with the false designation that the Ol' Roy brand pet food products were "Made in USA" and thereby unjustly reaped benefits and profits from consumers and the Class as a result of these representations. Defendants received and continues to receive sale benefits and profits at the expense of Plaintiff and the Class using such deceptive representation and designations.

(Complaint at ¶ 46).

> Defendants used the aforementioned representations to induce Plaintiff and the other members of the Class to purchase the Ol' Roy brand pet food products. Accordingly, Defendants received benefits which they have unjustly retained at the expense of Plaintiff and the Class members. Defendants have knowledge of this benefit, voluntarily accepted such benefit, and retained the benefit.

(Complaint at ¶ 47).

3. Plaintiff can Legally Plead the Violation of the Consumer Protection Laws of Defendants' Home States as Well as Nevada To Establish the Absence of any True Conflict of Law and the Manageability of the Nationwide Class

After careful analysis of the state consumer protection laws, Plaintiff determined that there is no true conflict of laws between the various states with respect to Defendants' liability for fraudulently mislabeling and selling the products as "Made in the USA." As a result, Nevada law can properly be applied to the claims of the absent class members.

Nevertheless, anticipating Defendants' argument that alleged difference in the laws of the various fifty states could arguably present manageability concerns in a nationwide action, Plaintiff performed a detailed analysis of the laws of the various states to show that there is no conflict of state laws on this issue and therefore no manageability problem. **All states follow federal law on this issue**. Moreover, Plaintiff's complaint specifically alleged how the domicile state law for each defendant was identical to Nevada, and therefore presents no conflict of law issue:

> **The laws of every other state are identical to and/or substantively similar to Nevada consumer fraud laws in that federal law and the laws of every state prohibit the use of deceptive representations regarding the geographic origin of products, and every state similarly authorizes an action by consumers for such conduct**. In addition, the laws of the state of Delaware, and in particular 6 Del. C. § 2532(a)(4) is identical to that of Nevada N.R.S. §598.0915.

(Complaint at ¶ 27).

> **This conduct violates Nevada law, and the law of every other state, including but not limited to California (Cal. Civil Code §1770(a)(4)), Arkansas (Ark. Stat. Ann. §4-88-107(a)(1)), Alabama (Code of Ala. §8-19-5(4)), and Delaware (6 Del. C. §2532), all of which laws are identical in prohibiting deceptive representations or designations of geographic origin in the marketing and sales of goods.**

(Complaint at ¶ 30).

As a result, Plaintiff further alleged:

> To the extent that the Nevada Consumer Fraud Act my be found not to protect the residents of other states, the consumer fraud acts of the Defendants' forum state could be applied to all members of the Class.

(Complaint at ¶ 35).

In the event this Court concludes at some later stage of proceedings that Nevada law does not apply to the claims of out-of- state consumers, the case will remain manageable because the law of the Defendants' forum state can be applied to the claims of all of the absent class members. For example, Plaintiff's alleges that all of the fraudulently labeled products were distributed from Arkansas and purchased by consumers from an Arkansas company (Wal-Mart). As a result, Arkansas law could be found to have a nexus to all of the claims in this case. The same is true with respect to California (Del Monte), Alabama (Sunshine Mills), Nevada (Chemnutra), and Delaware (Wal-Mart, Menu Foods, Sunshine Mills, Del Monte and Chemnutra). All these states follow the federal standard for labeling products as "Made in the U.S.A." and find mislabeling actionable by private citizens as a deceptive trade practice.

In *Philips Petroleum v. Shutts*, 472 U.S. 797 (1985), the United States Supreme Court held that a state court may constitutionally exercise jurisdiction over the claims of nonresident plaintiffs and defendants in a nationwide class action case and apply the law of the forum state if 1) the named plaintiff adequately represents the absent class members' interests; 2) the members of the class are given adequate notice and the opportunity to opt out; and 3) the forum state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair." 472 U.S. at 811-822. [8] **Here, Nevada and the states in which Defendants are headquartered all have a significant aggregation of contacts such that application of their law in this action would be "neither arbitrary nor fundamentally unfair" under *Shutts*.**

Moreover, choice of law analysis for a nationwide class action and a determination of its potential impact on the manageability of a class action are premature at the pleadings stage. *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 742 (D. Iowa 2007) (**On a motion for judgement on the pleadings "it is premature to determine the manageability of the proposed class action lawsuit given that it is unclear which, and how many, varying state laws will be implicated**."). In fact many courts have held that choice of law issues are even premature at the class certification stage. *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691 (S. D. Fla. 1998) ("It is well-established that consideration of choice of law issues at the class certification stage is generally premature"); *Kirschner Medical Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991); *In re Lilco Sec. Litig.*, 111 F.R.D. 663, 670-71 (E.D.N.Y. 1986); *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391, 399 (D.N.J. 1996).

4. Fraud Was Pled With Particularity Under the Standards Set in Nev. R. Civ. P. 9(b)

Under Nev. R. Civ. P. 9(b) and Fed. R. Civ. P. 9, fraud must be pled with particularity. This means the complaint must be specific regarding the time and place of the fraudulent activity, the identity of the parties involved, and the nature of the fraud.[9] Plaintiff's complaint satisfies Nevada law by specifically addressing each area of "particularity" that Rule 9(b) requires. The identity of the parties involved in the fraud is clearly described in the "Who" section of the Complaint which reads, "The Defendants each participated in the labeling..." (Complaint at ¶ 39) There is no doubt that Menu Foods is included within this group of Defendants. The "When" and "Where" sections of the Complaint satisfy the time and place requirements of Rule 9(b) by stating "Ol Roy" brand pet food deceptively misrepresented the country of origin "at all times prior to March 16, 2007" and the fraud was visibly present "on the label" itself. (Complaint at ¶ 39) In addition, the paragraph entitled "Nature of Fraud" describes how Defendants intentionally mislabeled the products in order to fool the consumer into thinking they were made in the United States and composed of American ingredients, thus qualifying for the "MADE IN USA" designation.

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[8] After review of the applicable state laws, the trial court, on remand, held that there was no conflict of laws between Kansas, the forum state, and other state laws implicated in the case. On appeal, the Kansas Supreme Court reviewed the laws of each of the eleven states involved in the case to determine the appropriate interest rate at issue. *Shutts v. Phillips Petroleum Corp.*, 240 Kan. 764, 732 P.2d 1286, 1292-1314 (Kan. 1987). Here also, there is no true conflict between the law of the forum state, in this case Nevada, and the other state laws implicated in this case.

Every Defendant knew the key wheat gluten component of the product originated from and was manufactured in China. In fact, every product Chemnutra sells is imported from China. Every Defendant knew that wheat gluten is the major manufactured component in a wet-style pet food containing gravy. Therefore, there can be no doubt that all Defendants knew that a major ingredient in "Ol Roy" pet food did not originate from the United States. Thus, the designation of "MADE IN USA" was not available as a marketing tool or as an indicator of country of origin. 62 FR 63768-70. The fact that Defendants did in fact use the label "MADE IN USA" is a clear indication of fraud.

The Complaint, therefore, satisfies Rule 9(b) by stating with particularity the nature of the fraud, which is virtually self-evident, the parties involved, and the time frame in which the fraud occurred. Any further specificity will clearly require further investigation and discovery. These allegations are legally sufficient as stated by the Court in *George v. Morton*, 2007 U.S. Dist. LEXIS 15980:

> So long as the complaint sufficiently describes the circumstances of the alleged fraud so that the defendant is able adequately to respond, the complaint meets the particularity requirement of Rule 9(b).

George v. Morton, *supra*, at *26, citing *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

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[9] *Rocker v. KPMG* 148 P. 3d 703, 704 (2006), 122 Nev. Adv. Rep. 101

5. Even if Fraud Was Not Pled With Sufficient Particularity as to Each Defendant, Nevada Has Adopted The Relaxed Pleading Requirements the Federal Courts Utilize, Where, as Here, the Facts Necessary To Plead Fraud with Particularity Are Within The Defendants' Knowledge or Possession.

In some cases, a strong inference of fraud is enough to satisfy the standards of Rule 9 (b) when the specific facts of the fraudulent activity are in the Defendant's possession.[10] In such cases, if the Plaintiff pleads particular facts giving rise to a strong inference of fraud, the Plaintiff should have an opportunity to conduct discovery and amend the complaint later to include the particular facts[11].

Here, any more specificity than has already been pled in the complaint is not readily unavailable without further investigation and discovery. As it stands, the inference of fraud is clear. The Defendants knew they were labeling "Ol Roy" brand pet food with the "MADE IN USA" designation with knowledge that at least one key component came from China. It was no accident that Defendants reaped the benefits of this oversight on many levels. First, they saved money by purchasing a key ingredient from a country half way around the world not known for their high standards with regard to food quality. Next, Defendants mislabeled the final product "MADE IN USA" which attracted buyers who believe that American food quality standards are the best in the world. Lastly, there were no customers who decided not to buy "Ol Roy" pet food because it was made with Chinese ingredients because there was no way for the American consumer to know this fact. Therefore, it is clear that Defendants knew they mislabeled "Ol Roy" brand pet food and reaped a great benefit from this intentional act.

In *Rocker v. KPMG*, the Nevada Supreme Court recently held that similar allegations sufficiently pled a claim for fraud under Nevada law:

> **[T]he consumers understandably were not more specific because a great deal of the information in this case was in the hands of KPMG and the other defendants.** Therefore, the consumers were unable to make allegations in their complaint with greater specificity in order to comply with the requirements of NRCP 9(b) for fraud complaints. This difficulty places the consumers in a classic catch-22-they are required to file a complaint to enable them to conduct discovery to ascertain the relevant information they need, but they cannot file a complaint with sufficient particularity because they do not know the information contained in KPMG's documents. **Many**

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[10] *Rocker v. KPMG* 148 P. 3d 703, 704 (2006), 122 Nev. Adv. Rep. 101

[11] *Id.* at 704.

> **courts have addressed similar situations and recognize an exception to the particularized pleading requirements.**

Rocker, 148 P. 3d at 708.

> **In that situation, the plaintiff may make an allegation on information and belief but "must state the factual basis for the belief."** When applying this relaxed standard, the federal courts require the plaintiff to allege more than suspicious circumstances. Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.

Rocker, 148 P. 3d at 708-9.

> This exception strikes a reasonable balance between NRCP 9(b)'s stringent requirements for pleading fraud and a plaintiff's inability to allege the full factual basis concerning fraud because information and documents are solely in the defendant's possession and cannot be secured without formal, legal discovery. **Therefore, we adopt this relaxed standard in situations where the facts necessary for pleading with particularity are peculiarly within the defendant's knowledge or are readily obtainable by him.**

Rocker, 148 P. 3d at 709.

Here, as in *Rocker*, the paper trail and/or other facts evidencing this fraud and each Defendant's role is in the exclusive control of the Defendants. The Complaint states as much as it reads, " Defendants possess superior knowledge of the true facts, including knowledge that certain components were imported under a "Made in China" designation..." (Complaint at ¶10). The press release information disclosed by the Defendants does not disclose how each Defendant specifically participated in the fraudulent designation of the product as "Made in USA." Therefore, Plaintiffs should be allowed to use the discovery process to uncover more details of fraud in order to later amend the Complaint should the court decide that the particularity of Rule 9(b) has not been satisfied.

V. CONCLUSION

For all of the reasons discussed herein, Plaintiff respectfully submits that Menu Food's motion should be denied.

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